

BEFORE THE UNITED STATES SENATE
 COMMITTEE ON THE JUDICIARY
 STATEMENT OF DAVID B. CONE
 ON THE NOMINATION OF
 SONIA SOTOMAYOR
 TO BE ASSOCIATE JUSTICE TO THE
 UNITED STATES SUPREME COURT

JULY 16, 2009

Thank you Chairman Leahy and also thank you members of the Committee. My name is David Cone. It is indeed an honor to appear before you again, 14 years and 5 months to the day after my first appearance. I realize many people are perhaps surprised a baseball player would be asked to testify about the nomination of a Supreme Court Justice. Probably no one is more surprised than me. But, on behalf of all Major League players, both former and current, we greatly appreciate the opportunity to acknowledge the unique role Judge Sotomayor played in preserving America's pastime.

As you know, I am not a lawyer, much less a Supreme Court scholar. I was a professional baseball player from the time I was drafted out of high school in 1981 until I retired in 2003. I broke into the Majors in 1986. During my career I pitched for my hometown team, the Kansas City Royals, the New York Mets, the Toronto Blue Jays, the Royals again, the Blue Jays again, the New York Yankees, the Boston Red Sox, and

finally in 2003 the Mets once more. Along the way, I was lucky enough to pitch in 5 All-Star Games and 5 World Series, and was especially fortunate that my team won each of those World Series.

I was also a union member and officer. In 1994 the Executive Board of the Major League Baseball Players Association elected me the MLBPA's alternate American League Player Representative. Then the next year I became the American League Player Representative and remained in that position until 2000.

Being a proud union member came naturally. I was raised in a blue collar family in Kansas City. My father was an active member of the United Steelworkers of America. I watched as that remarkable union fought to get fair contracts for its members. I watched as my dad struggled to provide his children with the opportunity to fulfill their dreams, including mine of becoming a Major League baseball player.

Years later, after I had achieved that dream, I was able to be a part of another remarkable union, the MLBPA. As is well known, Major League baseball has a long history of acrimonious labor relations between owners and players. It was not until the 1970's that the players-- under the leadership and direction of the MLBPA's first Executive Director, the legendary Marvin Miller-- first gained the rights of free agency and salary arbitration. This meant that for the first time ever, players were able to earn what they were worth, and were able to have some choice about where and for what team they played.

The next 20 years were quite tumultuous. In quick succession we endured a spring training lockout in 1976, a short strike in spring training in 1980, a long strike in 1981, a short strike in August of 1985, and another spring training lockout in 1990. To the players, each of these disputes seemed to be grounded in the owners' desires to turn back the clock and roll back the free agency rights that the players had won. Fortunately, due in no small part to the exemplary leadership of Don Fehr, our current Executive Director, we were able to preserve the rights our predecessor had sacrificed so much to obtain.

But the game may have experienced its darkest hours in 1994 and 1995. The owners announced their intention to obtain a salary cap, an artificial limitation on the amount players could earn. We did not believe that their proposal was fair, and could not accept it. The collective bargaining agreement had expired, and the owners refused to promise that following the season, they would continue to live by the rules of that contract. And so, believing we had no choice, the players went on strike in August of 1994.

To our surprise, the owners felt no urgency to negotiate. Before long, they announced the cancellation of the remainder of the season, which meant that there would be no World Series for the first time ever. For the players and many fans, it was one of the worst days in the game's history.

Discussions with the clubs continued throughout the fall and into the winter but proved fruitless. The owners' position never varied and, to many of us, it was clear they had little or no interest in reaching a new agreement. Still, it was a surprise when, in December 1994, the owners announced that they were unilaterally implementing new rules and conditions of employment. Those new rules included not only the owners' salary cap, but changes which they had never before even discussed, much less negotiated. We soon learned that under the new rules the core rights of free agency and salary arbitration essentially would be eliminated. And, it was announced they were preparing to start the 1995 season with so-called replacement players instead of real Major Leaguers.

Needless to say, we did not think the owners were negotiating in good faith, as they are required to do under federal law. Consequently, the Players Association went to the National Labor Relations Board. The NLRB reviewed our situation and agreed with our complaint. Following its statutory procedures, the Board went to federal court to seek an injunction against the owner's unilateral changes. The United States District Judge who drew the case was Judge Sonia Sotomayor.

The rest is history, or at least baseball history. Judge Sotomayor found that the owners had engaged in bad faith bargaining. She issued an injunction. Her decision stopped the unilateral imposition of new terms, ended our strike, and got all of us back on the field. The words she wrote cut straight to the heart of the matter:

“...This strike is about more than just whether the Players and Owners will resolve their differences. It is also about how the principles embodied by federal law operate. In a very real and immediate way, this strike has placed the entire concept of collective bargaining on trial.....Issuing an injunction by Opening Day is important to ensure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB’s inability to take effective steps against its perpetuation.”

Obviously I am not a lawyer, but from my years in baseball and my work in the union, I know how complex this case was. I know that Judge Sotomayor had only a few days to read reams of paper, absorb a very detailed set of facts, and sort through numerous intricate arguments, but she clearly understood the issues and what was at stake. She saw how important it was that the sport not resume with the cloud of an unfair labor practice hanging over it. Had the clubs resumed play without real players and then were found to have engaged in unfair labor practices, the damage would have been incalculable. Judge Sotomayor grasped not only the complexity of the case but its importance to our sport.

I should point out that her decision was upheld by a unanimous Circuit Court, a court comprised of judges appointed by different Presidents, from different parties and, as I have been told, of different judicial philosophies.

On the day he announced her appointment, President Obama observed that some have said that Judge Sotomayor saved baseball. Others may think this is an overstatement. But look at it this way: a lot of people, both inside and outside of baseball, tried to settle the dispute. Presidents, special mediators, Secretaries of Labor, members

of Congress – all tried to help but were not successful. As all of us who were involved in the negotiations ultimately realized, it is difficult to reach an agreement if one side is not interested in finding a compromise.

With one decision, Judge Sotomayor changed the entire dispute. Her ruling rescued the 1995 season and forced the parties to resume real negotiations. It took nearly two years to reach a new agreement. But from that painful experience, after decades of lockouts and strikes, relations between owners and players finally began to change. We were able to reach a new agreement in 2002 without interrupting play, breaking a string of eight consecutive work stoppages. Today, baseball is currently enjoying a run of more than 14 years without interruption, a record that would have been impossible to conceive back in the 1990's.

Judge Sotomayor's dedication and commitment enabled her to correctly and fairly apply the law in our case. Because of her decision, baseball is in far better shape today than it was fifteen years ago. I believe all of us who love the game – players, owners, and fans – are in her debt.

If Judge Sotomayor is confirmed, maybe the rest of the country will realize, as the players did in the 1990, that it can be a good thing to have a judge in district court or a Justice on the United States Supreme Court who recognizes that the law cannot always be separated from the realities involved in the disputes being decided.

Thank you, Mr. Chairman, for this opportunity. I would be happy to answer any questions you or the Committee may have.

Statement of

The Honorable John Cornyn

United States Senator
Texas
July 13, 2009

Sen. Cornyn's Opening Statement At Sotomayor Confirmation Hearing

WASHINGTON—U.S. Sen. John Cornyn, a member of the Senate Judiciary Committee and former Texas Supreme Court Justice, delivered his opening statement at Judge Sonia Sotomayor's confirmation hearing. Below are his remarks as prepared for delivery.

Judge Sotomayor, let me join my colleagues in extending a warm welcome to you and your family today. You have had a distinguished career as a lawyer and a judge. I enjoyed sitting down with you soon after you were nominated. And I am pleased to be able to welcome you to the Senate – and to give you an opportunity to introduce yourself to the American people.

In the history of the United States, there have been only 110 people who served on the Supreme Court. We should all stop and think about that. In more than 200 years, we have had only 110 Justices.

That means each and every Supreme Court nomination is a historic moment for our Nation. Each Supreme Court nomination is a time for a national conversation about the Supreme Court and its role. We have to ask ourselves: What is the proper direction of the Supreme Court?

To answer that, we need to recall our history. The Framers created a written Constitution to make sure our constitutional rights were fixed and certain. The state conventions who represented "We the People" looked at that written Constitution and decided to adopt it. The idea was that our rights would be written down for all to see.

This framework gave judges a role that is both unique in our form of government, and important. The role of judges was intended to be modest – that is, self-restrained and limited. Judges were not free to invent new rights as they saw fit. They were supposed to enforce what the Constitution's text says to enforce – and to leave the rest to the elected branches and to "We the People."

Over time, however, the Supreme Court has often veered off the course established by the Framers. First, the Supreme Court has invented new rights not clearly rooted in any constitutional text. For example, the Supreme Court has micromanaged the death penalty, creating new rights spun from whole cloth. It has announced constitutional rules governing everything from punitive damages to sexual activity. It has relied on international law that the

People never adopted.

The Supreme Court has even taken on the job of defining the rules for the game of golf. (If you're curious, the case is PGA Tour v. Martin from 2001). Some people call this "judicial activism." Whatever you call it, it's pretty far from enforcing the written Constitution that the Framers proposed and the people enacted.

As the Supreme Court has invented new constitutional rights – it has often neglected the old ones. This flip side is troubling, too. Many of the original important safeguards on government power have been watered down or even ignored.

Express constitutional limitations like the Takings Clause of the Fifth Amendment, the Commerce Clause limitations in Article I, and the Second Amendment's right to keep and bear arms have been artificially limited, almost like they were written out of the Constitution. Judges just haven't enforced them like the people expected them to.

So the Supreme Court has veered off course in multiple directions. The important question today is, where should the Supreme Court go from here? I think there are two choices.

First, the Supreme Court could try to get us back on course. That is, the Court could renew its respect for our original plan of government – and return us slowly but surely to the written Constitution. The Supreme Court's recent Second Amendment decision in *DC v. Heller* is a good example of this.

Second, the Court could veer off course once again – and follow its own star. It could continue to depart from the written Constitution. It could further erode the established rights we have in the text of the Constitution. And it could invent even more brand new rights not rooted in the text and not agreed to by the American people.

Judge Sotomayor, the purpose of this hearing is to determine which path you would take if confirmed to the Supreme Court. Would you vote to return to the written Constitution and the laws written by the elected representatives of the people? Or would you take us even further away from the written Constitution and laws legitimated by the consent of the governed?

To help the American people understand which of these paths you would take, we need to know more about your record. We need to know more about the legal reasoning behind some of your opinions on the Second Circuit. And we need to know more about some of your public statements related to your judicial philosophy.

In looking at your opinions on the Second Circuit, we recognize that lower court judges are supposed to be bound by Supreme Court and circuit precedent. To borrow a football analogy, a lower court judge is like the quarterback who executes the plays – not the coach who calls the plays.

That means many of your cases don't tell us much about your judicial philosophy. But a few of your opinions do raise questions – because they suggest the kinds of plays you'd call if you were

promoted to the coaching staff. These opinions raise the question: would you steer the Court in the wrong direction – by limiting the rights that generations of Americans have regarded as fundamental?

So Americans need to know whether you would limit the scope of the Second Amendment – and whether we can count on you to uphold one of the fundamental liberties enshrined in our Bill of Rights.

We need to know whether you would limit the scope of the Fifth Amendment – and whether you would expand the definition of "public use" by which government can take private property from one person and give it to another person.

And we need to know whether you would uphold the plain language of the Equal Protection Clause of the 14th Amendment promising that "No State shall ? deny to any person within its jurisdiction the equal protection of the laws."

Judge Sotomayor: some of your opinions suggest that you would limit some of our basic constitutional rights – and some of your public statements suggest that you would invent rights that do not exist in our written Constitution.

For example, in a 2001 speech, you argued that there is no objectivity in law, but only what you called "a series of perspectives" rooted in the life experience of each judge. In a 2006 speech, you said that judges can and even must change the law – even introducing what you called "radical change" – to meet the needs of an "evolving" society. And in a 2009 speech, you endorsed the use of foreign law in interpreting the Constitution on the grounds that it gives judges "good ideas" that "get their creative juices flowing."

Judge Sotomayor: we thank you for your candor in these speeches. Not every judicial nominee is so open about their judicial philosophy. Yet many Americans wonder what these various statements mean – and what you're trying to get at with these remarks. And many more wonder whether you are the kind of judge who will uphold the written Constitution – or the kind of judge who will veer us even further off course –and towards new rights invented by judges rather than ratified by the people.

Judge Sotomayor: These are some my concerns. I assure you that you will have every opportunity to address these concerns – and make clear which path you would take if you are confirmed to the Supreme Court. I welcome you to these hearings and I look forward to your testimony.

For more information on Sen. Cornyn's previous statements, floor speeches and his daily questions for Judge Sotomayor, please visit the Supreme Court section of his website – also available by clicking here.

Sen. Cornyn serves on the Finance, Judiciary and Budget Committees. He serves as the top

Republican on the Judiciary Committee's Immigration, Refugees and Border Security subcommittee. He served previously as Texas Attorney General, Texas Supreme Court Justice, and Bexar County District Judge.